In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 355

NORMAN M. LITTELL, PETITIONER

v.

RAYMOND NAKAI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of October 11, 1965, inviting the Solicitor General to express the views of the United States with respect to this case.

Petitioner, currently General Counsel and Claims Attorney to the Navajo Tribe of Indians, brought this action in the United States District Court for the District of Arizona to enjoin the Chairman of the Navajo Tribal Council from interfering with petitioner's rights and obligations under his contract with the tribe. The complaint (R. 3–13) alleged that the Chairman had prevented petitioner from making re-

ports to the Tribal Council[1] and had prevented the tribe from paying petitioner's accrued retainer fees.[2] It was alleged that, in taking these actions, respondent was acting beyond the scope of his authority as chief executive officer of the tribe. The complaint prayed for an injunction restraining respondent from interfering with petitioner's contract rights in any way, including the two particulars mentioned above. The district court dismissed the action for want of jurisdiction (R. 49), and the court of appeals affirmed, holding that, in the circumstances of this case, exclusive jurisdiction was vested in the Navajo tribal court (Pet. App. A2–A8).

In our view, the decision below does not warrant further review in this Court. The result is in con-

[1] The contractual provision with which the Chairman's action in this regard is alleged to have interfered reads as follows (R. 6–7):

> 3. Direction by Chairman, Advisory Committee, and Council: The said attorneys shall perform the duties required of them under this contract upon the request and at the direction of the Chairman of the Navajo Tribal Council, subject to such instructions as he may receive from time to time from the Advisory Committee or the Tribal Council. The General Counsel shall report to the Tribal Council at any regular or special meeting on any matters pertaining to the legal affairs of the Tribe when in his opinion or that of the Chairman, the Advisory Committee, or the Tribal Council, the best interest of the Tribe so require.

[2] Petitioner is presently protected in his claimed contractual right to retainer fees by an order of the United State District Court for the District of Columbia (Pet. App. A99) directing the Secretary of the Interior to process petitioner's pay vouchers even if the tribal officers fail to do so. The District of Columbia case is presently on appeal.

formity with the federal policy of fostering self-government in the Navajo tribe, recognized by this Court in *Williams* v. *Lee*, 358 U.S. 217. Whether or not the district court was wholly without jurisdiction to entertain the suit, we believe it was justified in remitting the plaintiff to his tribal court remedy in the circumstances. Accordingly, the case does not necessarily present the jurisdictional issue tendered by the petition. In any event, the question of federal jurisdiction over cases brought by out-of-State citizens against reservation Indians arising out of reservation affairs and involving over $10,000 is not a frequently recurring one that presses for decision.

1. In order to strengthen tribal self-government, with a view toward the ultimate assimilation of reservation Indians into the general society (see H. Rep. No. 848, 83d Cong., 1st Sess. 3, 6–7), the federal government has consistently encouraged the development of executive, legislative and judicial organs on Indian reservations to administer the internal affairs of the tribes. See, *e.g.*, Wheeler-Howard Act, §§ 16–17, 48 Stat. 987–988, 25 U.S.C. 476–477. There has been no departure from this policy with respect to the Navajos. See Navajo-Hopi Rehabilitation Act of 1950, § 6, 64 Stat. 46, 25 U.S.C. 636; 25 C.F.R. 11.1–11.87NH. As the Court stated in *Williams*, in holding that the courts of Arizona lacked jurisdiction over an action by a trading post operator against Navajos for goods sold and delivered on the reservation (358 U.S. at 223):

> The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it. * * *

It is apparent that "essential tribal relations" are involved in the present case[3]—perhaps more so than in *Williams*. As the court below pointed out (Pet. App. A8), the central issue here is the respondent's authority as chief executive officer of the tribe.[4] The source of respondent's authority in matters relevant here is the Navajo Tribal Code, which vests in the Chairman broad supervisory powers over tribal affairs.[5] It is not clear, however, whether these powers do or do not extend to the actions taken with respect to petitioner's reports to the Tribal Council and retainer fees. Resolution of this question, we submit, is properly left to the Navajo tribal court, which has jurisdiction over cases such as this (7 Navajo Tribal

---

[3] Contrary to petitioner's contention (Pet. 14), it is immaterial that the tribe is not a necessary party to the lawsuit. Cf. *Williams* v. *Lee*, *supra*.

[4] If, contrary to the allegations of the complaint, respondent was acting within the scope of his authority in his dealings with petitioner, the action would be barred by the doctrine of sovereign immunity, as applied to Indian nations. See, *e.g.*, *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512; *Adams* v. *Murphy*, 165 Fed. 304 (C.A. 8) (suit by tribal attorney against Chief of tribe to enjoin cancellation of the attorney's contract); Cohen, *Federal Indian Law* 494 (1958).

[5] The relevant provisions of the Code are set forth in the Appendix, *infra*, pp. 9–11.

Code 63(b), *infra*, p. 11) and can afford all the relief petitioner is seeking (7 Navajo Tribal Code 65, *infra*, p. 11).

In the circumstances, it may be that the courts of the United States, like those of the State of Arizona, wholly lack jurisdiction. That seems to be the teaching of *Williams* v. *Lee*, *supra*, in which this Court indicated that jurisdiction over suits involving "essential tribal relations" is exclusively vested in the tribal courts unless "expressly conferred on other courts by Congress * * *." See 358 U.S. at 219, 220; cf. *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 67–68. To be sure, the general diversity of citizenship statute (28 U.S.C. 1332),[6] on its face, covers this case (see *Felix* v. *Patrick*, 145 U.S. 317), but it was plainly not written with a view to Indian tribal cases and does not seem to evince a policy of sufficient strength to outweigh the specific congressional policy of discouraging outside interference in internal Indian affairs.[7] As already indicated, however, we do not believe the strict question of jurisdiction need be resolved here, for, in our view, the court, if it had jurisdiction, properly declined to exercise it in this case.

---

[6] Petitioner's claim of federal question jurisdiction was, in our view, properly rejected by the court below (Pet. App. A3–A4). In any event, the same considerations would require that claim to yield also.

[7] Indeed, insofar as the claim arises out of petitioner's exclusion from a meeting of the Navajo Tribal Council, it is arguable that it raises essentially a political question, properly resolved by appealing the Chairman's ruling to the Council. Petitioner does not allege that he sought to avail himself of that internal remedy.

2. It is well settled that, notwithstanding the presence of diversity of citizenship or a federal question, federal courts may be required by the force of countervailing policies to decline jurisdiction in particular cases. See, *e.g.*, *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (avoid constitutional issue); *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (avoid interference with administration of State's internal affairs); *Alabama Public Service Comm'n* v. *Southern Railway Co.*, 341 U.S. 341 (same). The principle applied in these cases appears to be equally applicable here.[8] When the equity jurisdiction of the federal courts is invoked in a case involving questions of intra-tribal regulation which can better be resolved, without any infringement of the plaintiff's rights, in the tribal courts, we believe it is proper for the federal courts to remit the parties to their tribal court remedies. This practice strengthens tribal self-government, safeguards the integrity of the tribal courts and conserves

[8] The abandonment of federal court jurisdiction in matters involving internal tribal affairs, notwithstanding general laws ostensibly conferring such jurisdiction, is by no means as startling a proposition as petitioner appears to believe (Pet. 12). In the criminal area, the Assimilative Crimes Act (18 U.S.C. 13) makes State criminal laws involving subjects not covered by federal criminal laws applicable to Indian reservations (18 U.S.C. 7; *Williams* v. *United States*, 327 U.S. 711, 713). And 18 U.S.C. 3231 provides in general terms for exclusive district court jurisdiction "of all offenses against the laws of the United States." Nevertheless, it is clear that where the accused and the victim are both reservation Indians, the federal courts have jurisdiction only over the ten crimes specified in 18 U.S.C. 3242. See *Williams* v. *Lee*, 358 U.S. at 220; Cohen, *Federal Indian Law*, 319–322 (1958); 18 U.S.C. 1152–1153.

the energies of the federal courts. It places within the tribe itself primary responsibility for the interpretation and implementation of the tribal laws and customs which govern the administration of its affairs. Moreover, it is in keeping with the spirit of federal laws and regulations dating from the Navajo treaty of 1868 (15 Stat. 667). As this Court stated in *Williams* v. *Lee, supra,* at 221–222, "[i]mplicit in these treaty terms * * * was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed."[9]

CONCLUSION

Believing that the case was correctly decided below, that the issue presented is one of relatively limited importance, and that appellant's rights can be ade-

[9] There is no merit to petitioner's claim (Pet. 12) that the tribal court remedy is inadequate because the judges thereof are appointed by the Chairman, in the first instance, for two-year probationary periods. Of the six judges on the present Trial Court panel, only one of whom will preside over this case, five were appointed by Chairman Paul Jones for probationary terms in June 1960. Four of these were elevated by the Tribal Council to permanent judgeships on September 20, 1962 (before the respondent was elected Chairman in 1963), and the fifth was made a permanent judge on December 16, 1964. The Chief Justice, who sits with two Trial Court judges of his choosing on the Court of Appeals, was given a probationary appointment by Chairman Jones in June 1960 and a permanent appointment on September 20, 1962. Permanent judges serve during good behavior until age seventy (7 Navajo Tribal Code 62). There is no reason to believe petitioner's case will not be fairly tried in the Navajo courts (see *e.g.*, 7 Navajo Tribal Code 441(a), *infra*, p. 12).

quately protected in the tribal courts, we respectfully submit that the petition for certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

NOVEMBER 1965.

APPENDIX

The Navajo Tribal Code provides:

Title 2, Section 101:

The Tribal Council shall be the governing body of the Navajo Tribe and shall consist of 74 delegates.

* * * * *

Title 2, Section 168:

(a) The office of Sergeant at Arms shall be filled by appointment of the Chairman of the Tribal Council and the appointee shall be paid such compensation as the Chairman in his discretion shall direct. The post may be filled by any member of the Navajo Police Force selected by the Chairman, with the approval of the Area Director, without compensation in addition to his regular pay.

(b) The Sergeant at Arms shall maintain order under the direction of the Chairman of the Tribal Council, and shall make appropriate arrangements for having the Council chamber and appurtenances maintained in a clear and orderly condition throughout the Council meeting. He shall also attend any Advisory Committee meeting if the Chairman so directs.

* * * * *

Title 2, Section 281(a):

There shall be one Chairman of the Navajo Tribal Council, and he shall hold office for a term of four years.

* * * * *

Title 2, Section 284:

(a) The Chairman of the Navajo Tribal Council may yield the chair to the Vice-Chairman in order to take part in the sessions of the Tribal Council. He may make recommenda-

tions and appoint committees. He shall be the Chairman of the Advisory Committee, and he may advise and assist the Government on any action or policy adopted by the Tribal Council.

(b) The Vice-Chairman shall be subordinate in authority to the Chairman and shall assist in carrying out the duties of the Chairman as the Chairman shall direct.

(c) The Vice-Chairman of the Tribal Council shall serve as Chairman of the Tribal Council when the Chairman is unable to perform his duties.

(d) In the absence of the Chairman, the Vice-Chairman shall preside over meetings of the Council and of the Advisory Committee.

(e) Responsibility for directing and supervising the personnel and executive or business staff of the Tribe shall be in the Chairman, and whatever duties in respect thereto may hereafter be carried out by the Vice-Chairman shall be in accordance with the Chairman's directions and instruction.

* * * * *

Title 2, Section 763:

(a) The Chairman of the Navajo Tribal Council shall preside over the deliberations of the Council and shall also act with full authority as the chief executive officer of the Tribe's administrative organization in the conduct, supervision, and coordination of Tribal programs as approved by the Council. He shall have ultimate responsibility for the proper and efficient operation of all Tribal executive divisions and departments. He shall represent the Tribe in negotiations with governmental and private agencies and meet with many off-Reservation organizations and groups in order to create favorable public opinion and good will toward the Navajo Tribe. The Chairman shall appoint various standing committees, including the Advisory Committee, within the Council, boards and commissions within and outside the

Council, to help in determining Tribal policy and procedures and to suggest appropriate actions on resolutions.

The Chairman's functions include but are not limited to those set out in this subsection.

(b) The Vice-Chairman of the Tribal Council, during the absence of the Chairman, shall preside over Tribal Council meetings and, when so directed by the Chairman, perform designated duties of the chief executive officer. The Vice-Chairman may preside over meetings of the Advisory Committee and can sign documents on behalf of the Tribe when authorized by the Tribal Council.

* * * * *

Title 7, Section 31:

The Judicial Branch of the Navajo Tribal Government shall consist of the Trial Court of the Navajo Tribe and the Court of Appeals of the Navajo Tribe.

* * * * *

Title 7, Section 63:

The Trial Court of the Navajo Tribe shall have original jurisdiction over:

* * * * *

(b) All civil actions in which the defendant is an Indian and is found within its territorial jurisdiction.

* * * * *

Title 7, Section 65:

The Trial Court shall have power to issue any writs or orders necessary and proper to the complete exercise of its jurisdiction.

* * * * *

Title 7, Section 122:

The Court of Appeals shall have jurisdiction to hear appeals from final judgments and other final orders of the Trial Court of the Navajo Tribe, except in criminal cases where the defendant is sentenced to less than 15 days' im-

prisonment or labor and/or to pay a fine of less than $26. In such cases there shall be no right of appeal.

* * * * * *

Title 7, Section 123:

The Court of Appeals shall have power to issue any writs or orders necessary and proper to the complete exercise of its jurisdiction, or to prevent or remedy any act of the Trial Court beyond such court's jurisdiction, or to cause the Trial Court to act where the Trial Court unlawfully fails or refuses to act within its jurisdiction.

* * * * * *

Title 7, Section 441(a):

In any criminal or civil case, but not in any domestic relations, decedent's estate, or miscellaneous case, as set out in section 63 of this title, any party shall, upon demand, be entitled to a jury trial of any issue of fact.

U.S. GOVERNMENT PRINTING OFFICE: 1969